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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: MTBE, et al.,

00 MDL 1898

4 -----x

5 March 30, 2007
6 11 a.m.

7 Before:

8 HON. SHIRA A. SCHEINDLIN,

District Judge

9 APPEARANCES

10 MARY KOCH, ESQ.

11 KARYN BERGMAN, ESQ.

12 JAMES COX, ESQ.

Attorneys for Plaintiff Larrabee

13 ANDREW GENDRON, ESQ.

14 PETER SACRIPANTI, ESQ.

Attorneys for Defendant Exxon Mobil Corp.

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18 (TELEPHONE CONFERENCE)
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(Case called)

THE COURT: I have a court reporter here so can you identify yourselves?

MS. KOCH: Mary Koch, along with James Cox and Karyn Bergman.

THE COURT: And you all represent the plaintiff?

MS. KOCH: Plaintiff, yes.

MR. SACRIPANTI: Peter Sacripanti representing Exxon-Mobil Corporation, along with my colleague from Venable Andrew Gendron.

MR. GENDRON: Good morning, your Honor.

THE COURT: Good morning, Mr. Gendron.

THE COURT: You said along with my colleague --

MR. SACRIPANTI: From Venable, your Honor.

THE COURT: This I hope is a very brief and simple conference call. There is some dispute going on about a notice of voluntary dismissal. Plaintiffs in a case called Larrabee v. Exxon-Mobil, which is a Maryland case, is that right?

MS. KOCH: That is correct.

THE COURT: You want to dismiss under Rule 41(a)(1) and the defendants say you can't do that because the answer has already been filed. Plaintiff says, no, an answer hasn't been filed because the sort of standard answer of the MDL isn't deemed to be an answer in this particular case.

Is that a fair summary of the dispute going on?

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1 MS. KOCH: Yes, your Honor, from the plaintiff's side.

2 THE COURT: So, Mr. Sacripanti, I don't remember the
3 history but in Ms. Koch's letter I guess she said I previously
4 said that in a similar case, the Alban case, apparently I said
5 the standard master answer wasn't an answer in these sort of
6 private plaintiff cases as opposed to the water authority cases
7 that make up most of the MDL. That is what she said. I don't
8 remember.

9 MR. GENDRON: If I may, may I answer that question?

10 THE COURT: Of course.

11 MR. GENDRON: The difference between the Alban case
12 and the Larrabee case is that in Alban there had been in
13 amendment of the master answer to include the Alban cases. We
14 had taken the position, based upon some earlier exchanges in
15 conferences before the Maryland cases had been brought in, that
16 the pendency of the master answer sufficed until the cases
17 could be sufficiently addressed. The court rejected that
18 position and we understand that. However, just as in the Koch
19 case, Exxon-Mobil responded to a virtually identical complaint
20 in the Larrabee case by amending the master answer to
21 specifically refer to it and to include Maryland affirmative
22 defenses. And to suggest that that is not good enough suggests
23 that the answer that has been pending for a year and a half in
24 the Koch case is insufficient, even though plaintiffs have
25 never before taken that position, and calls into question our

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1 parties' reliance on master answers generally with respect to
2 cases brought into the MDL and would seem to suggest that there
3 are a great many parties in default throughout the MDL. I
4 don't think that is what the court intended.

5 THE COURT: So assume you are right, Mr. Gendron, for
6 the sake of argument, I don't even hear from Ms. Koch for a
7 minute -- and assume you are right. You have answered and now
8 she wants to dismiss voluntarily anyway.

9 Are you opposing that?

10 MR. GENDRON: The answer is we don't know because we
11 asked them why they want to dismiss and they haven't responded
12 to us.

13 THE COURT: All right. Maybe she will tell us. I
14 thought it was to go to state court.

15 MR. GENDRON: I haven't heard a thing, your Honor.

16 THE COURT: Let's find out.

17 Ms. Koch, I think since he might well be right on this
18 answer problem we are going to have to presume it for a little
19 while, and tell me so that he can decide whether he wants to
20 oppose the voluntary dismissal anyway why you want to dismiss.

21 MS. KOCH: The major reason -- there are actually
22 three reasons that we want to dismiss. One is because we have
23 obviously the class action involved in it and we have done some
24 work in investigation in this case and this case is very
25 different from Falston in one glaring respect, and that is that

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1 in Falston there is only one other attorney involved who
2 represents a very small number of individuals. In Jacksonville
3 there is another attorney involved who represents about 84
4 individual families and so they have all filed individual
5 lawsuits and so we think that that obviously has an impact on
6 the ability to have a class certified in Jacksonville. We also
7 think in Jacksonville we would be amending the complaint
8 regardless because we want to add numerous other parties to the
9 complaint, other defendants; and, thirdly, we just have decided
10 that in light of those things we would prefer to proceed with
11 individual actions which we are prepared to file for about
12 approximately 120 families in the Jacksonville area. And so to
13 that end we intend to refile in state court individual actions
14 on behalf of those names.

15 THE COURT: The named plaintiffs here, Larrabee and
16 Depino and Rieger, they won't be bringing a class action in
17 Maryland. They will be bringing individual actions, and will
18 they be consolidated with the Jacksonville cases? Is that what
19 you are saying?

20 MS. KOCH: I don't know if the court will eventually
21 consolidate. We filed a complaint that puts all our plaintiffs
22 in one complaint. So I don't know that a scheduling order has
23 been set in Baltimore County. I know that there is an idea
24 they may be going to trial in May 2008, but that is all I know
25 about that in that particular case.

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1 THE COURT: All right.

2 Back to Mr. Gendron, now you know the reason.

3 MR. GENDRON: Yes, your Honor.

4 Well, the first point is whether they seek class
5 certification in this case or not, they have these claims
6 pending and there is no reason why they can't amend these cases
7 to include additional parties after Exxon-Mobil has gone
8 through the time, effort and expense of getting the case
9 removed. Certainly I am not entirely certain whether
10 numerosity is a concern of theirs, if they say they have 120
11 individual cases that they intend to file. That sounds like an
12 awful lot of people.

13 THE COURT: Mr. Gendron, I think you lost me. You are
14 trying to say you have some power to make them continue to
15 bring a class action when they don't want to?

16 MR. GENDRON: No, your Honor. Excuse me if I was
17 unclear.

18 THE COURT: Maybe it's me.

19 Go ahead.

20 MR. GENDRON: All I meant was I thought I had heard
21 them say that by virtue of the number of parties that Mr.
22 Snyder is representing in state court they thought that that
23 distinguished the Jacksonville litigation from the Falston
24 litigation in which they sought class certification and maybe
25 it was an unordered assumption on my part but I thought Ms.

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1 Koch was suggesting that there would be an opt out problem or a
2 numerosity problem, and then when I heard her say it sounded
3 like they were going to proceed with 120 individual cases
4 numerosity didn't seem like an issue to me. Maybe I just
5 didn't understand her. But the fact is regardless of whether
6 they seek class certification in this case or not, they have
7 pending claims. They can amend them. If they want to bring in
8 additional parties diversity isn't a basis for removal here so
9 that won't defeat the court's jurisdiction.

10 And in response to the court's question about
11 consolidation with the pending actions of Baltimore County,
12 there is a scheduling order in place. By the time these cases
13 would be filed in broader Baltimore County it would be past the
14 deadline for joinder of additional parties so there wouldn't be
15 consolidation with the May 2008 trial date.

16 THE COURT: All of which I don't really understand why
17 that would lead to your opposing a voluntary dismissal of this
18 case in federal court. I am not able to follow that.

19 MR. GENDRON: Well, your Honor, first of all, let me
20 say this is the first we have heard of the plaintiff's reasons
21 so we haven't had the opportunity to speak with our client and
22 I don't know what your client's position is and I would ask the
23 court for the opportunity to do that in any event and get back
24 to the court promptly. But just as a for instance, Exxon-Mobil
25 had a right to seek to get this case in the MDL and it did so

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1 properly.

2 THE COURT: What is the basis of jurisdiction on this
3 one?

4 MR. GENDRON: I am sorry?

5 THE COURT: What is the basis of jurisdiction on this
6 one?

7 MR. GENDRON: It's Section 1503 of the Energy Policy
8 Act of 2005.

9 THE COURT: So this one is staying no matter what the
10 Second Circuit does.

11 MR. GENDRON: Yes, your Honor.

12 THE COURT: Go ahead. Yes.

13 MR. GENDRON: Just as plaintiffs have, all things
14 being equal, a right to select their forum, defendants may
15 properly invoke removal jurisdiction and have a right to do so.

16 MS. KOCH: May I interrupt --

17 THE COURT: I have a question for Mr. Gendron.

18 What you are really saying is that if she re-files you
19 could remove again anyway. Is that right?

20 MR. GENDRON: Depending upon the nature of the
21 complaint that may very well be, in which case this would be a
22 futile exercise.

23 THE COURT: That is true. It really depends what you
24 allege because under the Energy Policy Act we don't have the
25 old jurisdiction problem, the one still under consideration in

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1 the Second Circuit. It comes here if it says what it needs to
2 say. So it's really a question of which jurisdiction. It's a
3 tricky thing. I think we should go back to basics.

4 Ms. Koch, do you want to be heard on the answer
5 problem? Because Mr. Gendron was pretty convincing that if he
6 specifically amended the answer to address the allegations in
7 the Larrabee case it would be a dangerous precedent to say he
8 hadn't filed an answer. That would throw in doubt a lot of
9 people, a lot of defendants, I mean, not people, but a lot of
10 entities' failure to answer so-called, and I can't have that.
11 That is the whole point of a master answer. While I may have
12 said that at the time of Alban prior to the amendment of the
13 answers to specifically address some of the issues raised in
14 these cases, unless you are pretty convincing I am going to
15 assume he answered. Then the question will be he will go back
16 to his people and see if they do want to oppose the voluntary
17 dismissal. We could get lucky and they don't, but if they do
18 want to oppose I will yet have another motion on my docket and
19 I will decide it.

20 MS. KOCH: They did not specifically address, your
21 Honor, the issue in their master answer. As a matter of fact,
22 your Honor, all they did was cite general Maryland law that
23 would entitle them to raise certain defenses in the case.
24 There was no specific addressing of the various allegations in
25 the complaint that was filed by our office. It's just a

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1 general recitation of the affirmative defenses available to
2 them under Maryland law.

3 THE COURT: But that may be enough. Why would he, in
4 a master answer that applies to sort of New York cases and
5 California cases and whatever cases, address Maryland law at
6 all? It seems to me that indicates he was specifically
7 responding. He was tailoring the master answer to the Maryland
8 cases. I don't need Maryland cases in New York or California.
9 There was obviously an effort to tailor a master answer. You
10 say, here are all the master allegations or answers and I add
11 Maryland defenses. That tells me that it was directed at the
12 Larrabee case.

13 MS. KOCH: Your Honor, I think that the rules require
14 that they have to also address case specific allegations to the
15 extent that they exist according to the manual for complex
16 litigation, and in your Honor's order in the transcript of the
17 status conference on January 13, 2005 and the case management
18 order, which embodies the rulings of that status conference,
19 you indicated that they have to address them, make specific
20 allegations to the extent they exist.

21 There are no case-specific allegations in the master
22 answer responding to the Larrabee complaint and I know there
23 are because I have seen the answer in Alban and it is case
24 specific and it's vastly different from the master answer where
25 they allege answers for all of their defenses in the Larrabee

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1 case.

2 THE COURT: Well, I don't have the answer in Larrabee
3 in front of me so I am having a hard time sort of being able to
4 rule on this on a telephone conference, although I would like
5 to because I really think this shouldn't require each side to
6 submit briefs and call it a pending motion. We will never get
7 through if we can't decide whether an answer has been filed.

8 But I guess you could send over the answer, Mr.
9 Gendron, and highlight the portions that you say comply with my
10 order and you in turn, Ms. Koch, can send over the portions of
11 the order that you are citing because I don't have that in
12 front of me. I don't know what I said in 2005. I don't know
13 what I said in the transcript and I don't know what I said in
14 the case management order. So would you have to send over both
15 of those to me.

16 MS. KOCH: We would like to see the answer in the
17 Alban complaint because that does illustrate it.

18 THE COURT: Send over a quick package, maybe Federal
19 Express, a drop in the bucket here, and just send over here the
20 appropriate pages of the CMO that you say address this, the
21 appropriate pages of the transcript that you say address this
22 and, if you want to, the Alban answer, and meantime somebody
23 send over the Larrabee answer, and in the first instance I have
24 to make a decision if that is an answer.

25 But Mr. Gendron's point is well taken. This could

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1 throw into disarray a lot of entities who believe they have
2 answered a lot of complaints suddenly learning they haven't
3 answered. The whole point of a master answer is to be
4 efficient when you have a large number of cases with a large
5 number of defendants. This may be a relatively small MDL so
6 far in terms of number of cases, maybe we have only 100. There
7 are cases around the country with 5,000, but if you multiply
8 100 times the number of defendants that are named we have a lot
9 of folks in this MDL.

10 MS. KOCH: Can I ask one question? I am curious, if
11 this is Exxon's position are they now saying they have now
12 waive their right to file a motion to dismiss?

13 MR. GENDRON: We haven't filed a motion to dismiss.

14 THE COURT: That is not her question. Her question is
15 having answered is that your responsive pleading?

16 MR. GENDRON: Yes, your Honor.

17 THE COURT: So you have waived the right to file a
18 motion to dismiss.

19 MR. GENDRON: For the preliminary motion to dismiss,
20 absolutely.

21 THE COURT: Please hold one second.

22 (Pause)

23 THE COURT: I am back, sorry.

24 MS. KOCH: Your Honor, I think our position stands as
25 it is and I am prepared to overnight to the court the

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1 information that you requested.

2 THE COURT: But you got an answer to your question
3 about motion to dismiss. Yes, his position is he filed an
4 answer.

5 MS. KOCH: That is not the position they took in Koch.
6 They filed a motion to dismiss in Koch. Even though they had a
7 motion and they certainly didn't indicate that they had waived
8 it by filing a master answer in Koch, and I only say that
9 because they reference Koch in reference to the way we handle
10 the Larrabee case and they went through with their motion to
11 dismiss in the Koch case and did not treat it as a master
12 answer in that regard -- as a master answer or as the answer in
13 that particular case.

14 MR. GENDRON: If your Honor please, we filed the
15 amended master answer to defend Koch after the court denied our
16 motion to dismiss.

17 THE COURT:: Your motion to dismiss preceded filing
18 any answer?

19 MR. GENDRON: Yes, your Honor.

20 THE COURT: What about that, Ms. Koch, do you remember
21 that?

22 MS. KOCH: I apologize, your Honor. I am asking my
23 colleague.

24 THE COURT: Okay.

25 MS. KOCH: I apologize, that is right.

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1 THE COURT: I guess that doesn't count.

2 MR. GENDRON: If your Honor please, there is one point
3 I would like to add with respect to this notion of the answer
4 to the Koch complaint and the Larrabee complaint. A theme that
5 came up in the Koch case very early on with respect to the
6 plaintiff's motion to remand was whether that complaint had
7 so-called product liability allegations concerning MTBE and
8 plaintiffs claiming it didn't and the court concluding after a
9 very careful analysis that yes in fact it did. The complaint
10 in Larrabee is but for the site of the spill and the name of
11 the parties and as such is virtually identical with respect to
12 those substantive allegations.

13 MS. KOCH: Absolutely not.

14 MR. GENDRON: Excuse me, to the extent anyone is
15 claiming that the answer to the Koch complaint is somehow the
16 answer to it that is okay, but it's not with respect to
17 Larrabee. That is an inconsistent position.

18 MS. KOCH: I have a couple of things to say. The
19 first thing is that Mr. Gendron's recitation of what happened
20 is not accurate because the difference in the Koch case is
21 plaintiffs had actually in the initial Wagner case filed an
22 actual product liability element in the first complaint and
23 when we filed the second complaint the court said after the
24 first complaint this one sort of smelled of products liability
25 also but there was no actual product liability complaint in the

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1 Wagner complaint before it moved to the first complaint that
2 plaintiffs have filed. We have not made an allegation on
3 products liability at all. And that issue is not before the
4 court anyway. That is something that is going to be argued
5 another day.

6 I think that also what Mr. Gendron has to be cognizant
7 of is that the issue we are talking about now is really the
8 issue in terms of class certification. We are only talking
9 about three plaintiffs' cases.

10 THE COURT: I don't think anybody is making a Rule 23
11 argument but what I do think is that that is the issue that he
12 would face. If he decides not to oppose the voluntary
13 dismissal you refile, then he has to evaluate it for removal.
14 That is when he has to decide whether he thinks there is a
15 product liability claim, right?

16 MR. GENDRON: A product liability or a claim that
17 implicated Section 1503, your Honor.

18 THE COURT: Fair enough. Maybe that would be the
19 better approach. We will see where the strategy turns.

20 So I would like you not to burden the court if,
21 indeed, your decision is going to be not to oppose the
22 voluntary dismissal anyway, but since you may decide the other
23 way around I am going to have to look at this answer question.
24 So my clerk does point out if you want to e-mail the materials
25 to him we would be able to I hope handle the printing out here.

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1 MR. GENDRON: May I make a suggestion?

2 THE COURT: Yes.

3 MR. GENDRON: It might be helpful and avoid burdening
4 the court.

5 THE COURT: I like that. Because of the Energy Policy
6 Act we are starting to get more new cases so I can see this
7 thing growing.

8 That is for Mr. Sacripanti's benefit, that last
9 comment. The filings are coming.

10 MR. GENDRON: If your Honor please, as you pointed
11 out, it may very well be that my client decides not to oppose.

12 THE COURT: Right. That is what I mean. That would
13 be great.

14 MR. GENDRON: And if we might have a few days to
15 confer with our client and come back to the court it wouldn't
16 be necessary for anybody to send anything in to the court for
17 anything to be printed out or reviewed or for any more time of
18 the court be taken up on this issue.

19 THE COURT: Except maybe there is going to be a
20 lurking problem with the answer questions. I don't know
21 whether Mr. Sacripanti thinks this is sui generis or whether
22 this could arise a lot and we need to sort out when an answer
23 is an answer.

24 Do you think we need to face that now or if this one
25 goes away we can let it ride?

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1 Mr. Sacripanti, what do you think?

2 MR. SACRIPANTI: I think if this one goes away we can
3 let it ride. Although, your Honor, I do agree with Mr.
4 Gendron.

5 THE COURT: I realize you represent the same clients,
6 not surprisingly. If we think we can let it ride in general,
7 then Mr. Gendron's suggestion is right.

8 Ms. Koch, would there be any problem if we wait until
9 Wednesday and wait to see if he opposes a voluntary dismissal?

10 MS. KOCH: I don't want to put any more work on your
11 plate certainly, but the problem is it's just more delay. We
12 are ready to file.

13 THE COURT: I understand that. But we do have to give
14 him time to check with his people as to what they want to do.
15 What he shouldn't present to them assuming answers and assuming
16 we have the right to contest to we want to. There is tactical
17 reasons why they might not want a ruling from the court now.
18 He is saying give me a couple of days. I suggested Wednesday
19 because I hoped to be out Monday and Tuesday.

20 MR. GENDRON: I think that should be sufficient time
21 and I appreciate that.

22 MS. KOCH: I would say since Mr. Gendron raised this
23 issue himself it would have been nice if counsel would have
24 talked to their client.

25 MR. GENDRON: Your Honor, I had initially attempted on

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1 the day we received a notice of dismissal to call Ms. Koch and
2 then when Ms. Koch did not return my call and I spoke to
3 Mr. Cox, Mr. Cox referred me to Ms. Bergman to ask Ms. Bergman
4 to return my call to discuss this, and I didn't hear from
5 anyone. I then reached out through other means to other people
6 in their office to see if there was a response and no response
7 was forthcoming. The inability to discuss this regrettably was
8 not on Exxon-Mobil's part.

9 MS. KOCH: Our position doesn't change. In talking
10 about the clients I would explain what the position is
11 irrespective, in any event.

12 THE COURT: I will give them until Wednesday to get
13 back. Prepare your packets in case he says he wants to oppose.
14 Prepare your packets to show whether or not the answer is an
15 answer.

16 MR. SACRIPANTI: You know what, your Honor, with the
17 court's permission if we are really saying that these master
18 answers are not, in effect, answers --

19 THE COURT: Sometimes. She is saying it in her case
20 anyway, let's go that far.

21 MR. SACRIPANTI: I hope it's sui generis. As liaison
22 counsel I probably have an obligation to go back to the group
23 and say this was raised and is this something we want the court
24 to focus on.

25 THE COURT: Right.

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1 MR. SACRIPANTI: So maybe if you would allow me as
2 well until next Wednesday.

3 THE COURT: Okay.

4 MR. SACRIPANTI: To come back and say we would like
5 this adjudicated.

6 THE COURT: Well, that is a little bit of tactics too.
7 You have to work with Mr. Gendron and if it's not ripe for this
8 case I am not going to do it in the abstract either.

9 In any event, should we have a telephone conference on
10 Wednesday?

11 I don't know what my schedule is. Hold on.

12 How about 3:30 for a telephone conference?

13 MR. GENDRON: Wednesday the 4th, your Honor?

14 THE COURT: Yes. Is that okay?

15 MS. KOCH: One second. That is fine.

16 THE COURT: A 3:30 telephone conference. Stay in
17 touch with my clerk as to how to set it up.

18 MS. KOCH: We will just set it up again, your Honor.

19 THE COURT: Let him know what we have to do.

20 Thank you.

21 MR. GENDRON: Thank you, your Honor.

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